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IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

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COURT OF CRIMINAL APPEALS
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EX PARTE RANDY HALPRIN,	§	CAUSE NO. WR 77,175-05
	§	
APPLICANT	§	
	§	

BRIEF OF PROMINENT JEWISH MEMBERS OF THE STATE BAR OF TEXAS, THE AMERICAN JEWISH COMMITTEE, THE UNION FOR REFORM JUDAISM, THE CENTRAL CONFERENCE OF AMERICAN RABBIS, AND MEN OF REFORM JUDAISM AS AMICI CURIAE IN SUPPORT OF RANDY HALPRIN'S APPLICATION

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are Jewish members of the State Bar of Texas ("Amici Lawyers"), the American Jewish Committee, the Union for Reform Judaism, the Central Conference of American Rabbis, and Men of Reform Judaism. A list of the names of Amici Lawyers follows in the attached Appendix.

As members of the State Bar of Texas, many of Amici Lawyers have spent decades practicing in Texas courts, where they have represented a myriad of members of racial and religious minority groups. Amici Lawyers and their clients have relied upon the integrity and impartiality of the justice system and the judicial officers who presided over their cases.

American Jewish Committee (AJC) was founded in 1906 in reaction to officially instituted pogroms in Czarist Russia. Ever since, it has opposed any manifestation of official bigotry—whether Jim Crow, religious favoritism, or as in the case, anti-Semitic taints to criminal trials. AJC has two chapters in Texas, many members and leaders who are lawyers, and all of whose members depend on the fairness of the judicial system.

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews; the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis; and Men of Reform Judaism come to this issue informed by Jewish tradition and historical

experiences that compel their commitment to an unbiased judiciary for all racial and religious minority groups, as the preservation of the rule of law rests on the fairness of the courts for all people.

Amici maintain an interest in preserving public confidence in the criminal justice system and the Texas judiciary. Amici Lawyers are "entrusted by the People of Texas to preserve and improve our legal system." Texas Lawyer's Creed (preamble). Amici file this brief out of concern that if this Court does not address and correct such a flagrant example of judicial bias, Amici Lawyers' ability to represent and advocate for clients—especially clients who may feel that their cases cannot be impartially judged in Texas courts—will be impaired.

No fees were paid for the preparation of this brief.

INTRODUCTION

This is a case that should not be. Well into the twenty-first century, it is beyond dispute that a trial conducted before a racist judge who boasts of his bigotry is no trial at all. If the allegations here are true—and they unfortunately ring true—the trial was no trial, and the verdict no verdict, because the judge was no judge.

And that would be the case even if this merely involved a Class C misdemeanor. But this is a capital murder case, in which an individual's life is in the balance, making it all the more urgent that the credible allegations of bias are

fully aired and determined. If they are true, the only remedy is to order a new trial before an impartial judge.

To be sure, the defendant is charged with a horrible crime. We don't know whether he is guilty or what an appropriate sentence should be for the acts for which he is charged. But at this moment, those issues are irrelevant, because questions of guilt and punishment follow a fair trial; they do not precede it. And if Judge Cunningham is the bigot described in the application, a fair trial has not yet happened.

Amici Lawyers are members of the State Bar of Texas. Many of us are litigators, who regularly appear before the judges of the State. We routinely tell our clients—a cross section of the culturally diverse population of Texas—that the judges who decide their cases will do their best to judge impartially, without regard to race, national origin, gender, or religion.

In our experience, judges overwhelmingly strive to and do just that. But where, as here, the judge is a bigot (no polite euphemism will do), the judicial system must purge itself of the resulting vestige of bias that undermines public confidence in the integrity and impartiality of our judiciary.

Simply put, no individual should be executed without getting a fair trial untainted by considerations of race. In the words of Chief Justice Roberts, speaking on behalf of the majority in a capital case involving a bias-infected jury:

> [W]hen a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.

Buck v. Davis, 137 S. Ct. 759, 777 (2017).

When the deadly toxin emanates from the presiding officer, the integrity of our judicial system is called into question. This court should address and correct this grievous wrong.

SUMMARY OF THE ARGUMENT

The right to a fair and impartial trial in Texas is guaranteed by both the state constitution and by statute. *See Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989); TEX. GOV'T CODE ANN. § 62.105 (Vernon 1988). Texas courts have recognized that the right to an impartial judge is not only a blackletter rule of constitutional law, but also integral to the functioning of the entire Texas judicial system:

> Public policy demands that a judge who tries a case act with absolute impartiality. It further demands that a judge appear to be impartial so that no doubts or suspicions exist as to the fairness or the integrity of the court. Judicial decisions rendered under circumstances that suggest bias, prejudice or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the principles on which the judicial system is based.

Metzger v. Sebek, 892 S.W.2d 20, 37–38 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (*quoting CNA Ins. Co. v. Scheffey*, 828 S.W.2d 785, 792 (Tex. App.—Texarkana 1992, writ denied) (citations omitted)).

The evidence before this Court raises grave doubts about whether Randy Halprin's trial included "[o]ne of the most fundamental components of a fair trial … a neutral and detached judge." *Markowitz v. Markowitz*, 118 S.W.3d 82, 86 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Instead of recusing himself, Judge Vickers Cunningham chose to preside over the trial of Randy Halprin—a Jewish defendant he thought of as a "kike"—and the trials of Latino co-defendants—who no longer have a remedy because they have already been executed—he called "wetbacks." Review of the merits of the Mr. Halprin's claim is necessary in order to avoid raising grave doubts about whether litigants in Texas who are members of religious and ethnic minorities can rely on the impartiality and neutrality of Texas judges.

In order to maintain the integrity of and restore confidence in the Texas criminal justice system, amici urge this court to find the application satisfies the requirements of TEX. CODE CRIM. PRO. art. 11.071, § 5(a)(1), stay the applicant's scheduled execution, and remand this case to the trial court for findings of fact and conclusions of law.

ARGUMENT

I. THE EXTRAORDINARY FACTS OF THIS CASE WARRANT THIS COURT'S INTERVENTION

Litigators and judges alike are acutely aware of "the importance of according finality to judgments," *Frost Nat. Bank v. Fernandez*, 315 S.W.3d 494, 510 (Tex. 2010), especially in criminal cases. In enacting Section 5 of Article 11.071 of the Texas Code of Criminal Procedure, the "Texas Legislature … balanced the rights of a convicted death row inmate to seek collateral review of possible violations of his constitutional rights at trial against society's legitimate interest in finality of judgments." *Ex parte Graves*, 70 S.W.3d 103, 117 (Tex. Crim. App. 2002). The extraordinary evidence the applicant has filed in this case bridges any gap between the interests of a death-sentenced inmate and the interest of society.

Mr. Halprin asserts that he learned about Judge Cunningham's anti-Semitic and anti-Latino biases only after *The Dallas Morning News* reported (years after the trial) on the anti-miscegenation clause in the judge's living trust, and his use of the n-word to describe criminal cases with African American defendants. Amici are aware of nothing that would have alerted Mr. Halprin to Judge Cunningham's animus towards Jews in general, or to him personally, before the *Morning News* article was published.

Lawyers and litigants in Texas will be better served if this Court decides that Mr. Halprin's judicial bias claim "could not have been presented previously … because the factual … basis for the claim was unavailable on the date the applicant filed [his] previous application." TEX. CODE CRIM. PRO. art. 11.071, § 5(a)(1). It is vitally important to the lawyers of this State that this Court conclude "the factual basis [for Mr. Halprin's claim] was not ascertainable through the exercise of reasonable diligence on or before" he filed his previous application. *Id.* at § 5(e).

Judge Cunningham was required to "perform [his] judicial duties without bias or prejudice." TEX. CODE JUD. CONDUCT, Canon 3(B)(5). His anti-Semitic statements and his use of slurs to identify Mr. Halprin and his co-defendants show that the Judge could not perform his duties as required. When Judge Cunningham failed to recuse himself pursuant to TEX. R. CIV. P. 18b,[1] and he made no anti-Semitic comments during the trial, he concealed from Mr. Halprin and his counsel any reason to investigate the possibility of bias. A decision from this Court that a criminal defendant and his counsel are not reasonably diligent unless they investigate judicial bias in a case where there is no visible evidence of bias would shatter the "presumption of honesty and integrity in those serving as adjudicators"

[1] *See* 48B Robert Schuwerk & Lilian Hardwick, *Texas Practice Series: Handbook of Texas Lawyer and Judicial Ethics* § 40:44 ("a judge may err by not recusing *sua sponte*").

in Texas, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), and alter the relationship of trust between the bench and bar.

As the United States Court of Appeals for the Eleventh Circuit wrote in another case in which a death-sentenced inmate raised a claim of judicial bias in a successive habeas petition:

> [B]oth litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics. A contrary rule would presume that litigants and counsel cannot rely upon an unbiased judiciary, and that counsel, in discharging their … obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges before whom they appear. Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process—all to the detriment of the fair administration of justice.

Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995).

This Court and the Texas Supreme Court have recognized that "[p]ublic trust is the justice system's principal asset."[2] Preserving that trust is why this Court and the Supreme Court organized a summit called "Beyond the Bench: Law, Justice, and Communities."[3] Empirical evidence supports this Court's concern about the role of trust, and indicates that a ruling for the applicant in this case would promote society's interests.

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[2] Beyond the Bench: Law, Justice, and Communities Toolkit, Executive Summary at 1, available at http://www.txcourts.gov/media/1437380/final-online-btb-toolkit.pdf.

[3] *See generally* Beyond the Bench: Law, Justice, and Communities Toolkit, available at http://www.txcourts.gov/media/1437380/final-online-btb-toolkit.pdf.

Public faith in the legitimacy of the criminal justice system depends not only on "the quality of decision making or the quality of treatment of defendants," but the provision of opportunities for error correction when trial procedures are not "neutral, accurate, consistent, trustworthy, and fair." Bowers & Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 215-16 (2012) (cited in *Rosales-Mireles v. U.S.*, 138 S. Ct. 1897, 1908 (2018) (stating "the public legitimacy of our justice system relies on procedures that ... provide for error correction.")).

II. THE APPLICANT HAS STATED A PRIMA FACIE CASE OF STRUCTURAL ERROR

"An applicant fails to surmount the Section 5 procedural bar to allow for the consideration of the merits of a subsequent claim if he fails to make a prima facie showing of a constitutional violation." *Ex parte Alba*, 256 S.W.3d 682, 691 (Tex. Crim. App. 2008) (Cochran, J., concurring) (citing *Ex parte Brooks*, 219 S.W.3d 396, 400–01 (Tex. Crim. App. 2007), and *Ex parte Staley*, 160 S.W.3d 56, 64 (Tex. Crim. App. 2005)). Public confidence in the criminal justice system would suffer greatly were this Court to conclude that an applicant fails to state a prima facie case of unconstitutional bias when he submits eyewitness accounts of a trial judge using religious and ethnic slurs to describe his work on a capital case.

A defendant is denied the constitutional right to a fair trial if an objective observer, after "considering all the circumstances alleged would conclude the risk of bias was too high to be constitutionally tolerable." *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017). While most cases on review for judicial prejudice require a court to ask whether "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias'," here the court has unequivocal evidence of "actual, subjective bias." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009)). No further inquiries are necessary.

And because an impartial judge is so foundational to fair process, a "criminal defendant tried by a biased judge is entitled to have his conviction set aside, no matter how strong the evidence against him." *Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008) (quoting *Edwards v. Balisok*, 520 U.S. 641, 647 (1997)).

Judge Vickers Cunningham referred to Mr. Halprin as "that fuckin' Jew" and a "goddamn kike." He ascribed to at least one old anti-Semitic trope and believed that Jews "needed to be shut down because they controlled all the money and all the power." Under settled Texas and federal law, these beliefs and statements clearly meet the definition of bias.

Judicial bias "connote[s] a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved..., or because it is excessive in degree." *See Casas v. State*, 524 S.W.3d 921, 923–24 (Tex. App.—Fort Worth 2017, no pet.) (*quoting Liteky v. United States*, 510 U.S. 540, 550 (1994)); *see also Abdygapparova v. State*, 243 S.W.3d 191, 198 (Tex. App.—San Antonio 2007, pet. ref'd). Cunningham's statements are wrongful, inappropriate, undeserved, and excessive. They evidence a "deep-seated … antagonism that would make fair judgment impossible." *Abdygapparova*, 243 S.W.3d at 198–99 (quoting *Liteky*, 510 U.S. at 555).

Judge Cunningham's statements cannot be excused or described as acceptable judicial comments within the course of litigation. The beliefs about Jews reflected in the statements attributed to him are his own, long-held biases, not based on judicial rulings. *See Casas*, 524 S.W.3d at 923–24. Neither were they based on any knowledge or information gained in the course of trying Mr. Halprin's case. *See Quinn v. State*, 958 S.W.2d 395, 402–03 (Tex. Crim. App. 1997); *Abdygapparova*, 243 S.W.3d at 198–99. Texas law is clear that hateful and prejudicial rhetoric cannot hide behind the robe.

Indeed, litigators need spend little time in trial to understand why the Supreme Court has described a biased judge as a defect in the "whole adjudicatory framework." *Williams*, 136 S. Ct. at 1902. "The entire conduct of the trial from

beginning to end is obviously affected . . . by the presence on the bench of a judge who is not impartial.*" Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). In any case, "the tone of voice of the judge, his facial expressions, [and] his unspoken attitudes and mannerisms . . . as well as his statements and rulings of record, might have adversely influenced the jury and affected its verdict." *Norris v. United States*, 820 F.3d 1261, 1266 (11th Cir. 2016) (quoting *United States v. Brown*, 539 F.2d 467, 469 (5th Cir. 1976)).

Moreover, the risk of improper influence is vastly greater in a capital case where each individual juror has discretion to give mitigation evidence whatever weight he or she deems appropriate, and the jury must unanimously agree that the mitigation is insufficient to call for a life sentence before imposing the death penalty. *See* TEX. CODE CRIM. PRO. art. 37.071, § 2(d)(2)-(3); *Mills v. Maryland*, 486 U.S. 367 (1988).

CONCLUSION

Amici urge this Court to acknowledge that a judge with the deep-seated biases displayed in Judge Cunningham's statements could exert undue influence on the litigation in countless ways, even without intending to. Any source of bias that might lead a man "not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Tumey v. Ohio*, 273 U.S.

510, 532 (1927). Even if Judge Cunningham were unaware of how his bias affected him, his prejudices—thinking of a Jewish defendant as a "kike" and his Latino co-defendants as "wetbacks"—rendered him unable to be neutral on pretrial motions, challenges to jurors, objections to evidence, proposed jury instructions, and his interactions with the lawyers, defendant, and jurors, regardless of whether they may appear facially neutral in the record.

The Court should promote public confidence in the criminal justice system by finding that Mr. Halprin could not previously have discovered the factual basis for his claim through the exercise of reasonable diligence, and concluding he has stated a prima facie case that his trial judge's anti-Semitic statements create an unconstitutional risk of bias or establish actual bias.

Respectfully submitted,

/s/ Marc R. Stanley

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 2,927 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Marc R. Stanley
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September 2019, I filed the foregoing brief using the efile.tx.gov system pursuant to Texas Rule of Appellate Procedure 9.5(b)(1).

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